DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

LEGAL BULLETIN

PROVIDING HIGHWAY SAFETY AND SECURITY THROUGH EXCELLENCE IN SERVICE, EDUCATION, AND ENFORCEMENT

JULIE L. JONES, EXECUTIVE DIRECTOR VOLUME MMX, ISSUE 10

1st DISTRICT COURT OF APPEAL

Defendant's pre-*Miranda* statements were properly admitted under the private safety exception/rescue doctrine to *Miranda* rule.

Smith appealed his judgment and sentence, "arguing that the trial court erred in admitting his statement that he did not have 'any more crack cocaine in him' when questioned by police officers after they saw him spit out several pieces of a partly-chewed substance which the officers recognized from their experience to be crack cocaine." Smith alleged that when he made the statement to the officers, "he had not been administered the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966)." The State asserted that "Smith's pre-Miranda statement was admissible under the rescue doctrine, also known as the private safety exception to the Miranda rule."

The 1st DCA referred to New York v. Quarles, 467 U.S. 649 (1984), where the United States Supreme Court "recognized a public safety exception to the Miranda rule, holding that statements obtained without Miranda warnings are admissible when immediate questioning is necessary to secure the safety of the public. . . ." In Benson v. State, 698 So. 2d 333 (Fla. 4th DCA 1997), the 4th DCA "extended the Quarles exception to circumstances where the suspect making the pre-Miranda statement was confronted with a life-threatening medical emergency." The Benson court applied "the three-part test enunciated in People v. Riddle, 148 Cal. Rptr. 170, 177 (Cal. Ct. App. 1978)," and "specifically found that the facts in that case satisfied the three-part test for application of the rescue doctrine, and that the police officers had an objectively reasonable concern that Benson was facing a life-threatening emergency."

The 1st DCA determined that the facts in the instant case were "virtually identical to those presented in Benson" and affirmed Smith's judgment and sentence. The 1st DCA held "that the private safety exception applies under the facts of this case where the police officers had an objectively reasonable concern for Mr. Smith's safety."

> [T]he pre-Miranda statements made by Mr. Smith were properly admitted under the private safety exception or rescue doctrine. The circumstances of this case satisfy the three-part test enunciated in Riddle: the need for information was urgent; there was a possibility of rescuing a person whose life may have been in danger; and the rescue of Mr. Smith appears to be the primary purpose and

motivation of the interrogator. See Benson, 698 So. 2d at 337. As in Benson, the testimony shows there was an objectively reasonable concern for Mr. Smith's life: Mr. Smith was observed chewing several pieces of crack cocaine and it was unknown if or how much he had swallowed. It was obvious to all the officers on the scene that this posed a serious danger to Mr. Smith's health. Mr. Smith's argument that there appeared to have been time to administer Miranda warnings is without merit in light of the facts and circumstances of this case. "The right to remain silent would be of little practical value to a defendant who becomes comatose from a drug overdose while being read his Miranda rights." Id. at 337-38.

[*Smith v. State*, 09/13/10]

Order suppressing evidence reversed; police had probable cause to arrest defendant at time he was taken into custody.

The State appealed the trial court's orders "granting the defendant's motion to suppress any evidence obtained as a result of his allegedly unlawful arrest."

The facts revealed that Kelly Jo Holley was shot while in a residence in the Derby Woods subdivision in Lynn Haven, Florida, in the early morning hours of April 4, 2009. Oliver Schmidt was out walking his dog around 1:30 a.m. He observed a navy blue or black BMW parking near the residence where Holley was shot. Schmidt actually spoke briefly with the man that exited that vehicle. Schmidt later heard a gunshot. While calling 911, he heard "a vehicle start up and speed down the street." Schmidt saw "a navy blue or black sporty vehicle speed out of the subdivision and head west on Highway 390." Lieutenant Ward arrived at the scene and based on information he received, he "put out a BOLO for a black sporty vehicle heading west on Highway 390." Lt. Ward discovered "a shot was fired from outside the residence into the front bedroom and Holley had been shot in the back." No one saw the shooter. Lt. Ward was informed that a possible suspect might be Cuomo. He was a former boyfriend who was "allegedly harassing and/or stalking Holley." Holley told the officer that Cuomo "drove a black BMW." The BOLO was updated with more information. Deputy Stanford spotted and "pulled over a black BMW heading west on Highway 390." The vehicle was registered to Cuomo. Cuomo identified himself and at 1:54 a.m., Deputy Stanford detained Cuomo by handcuffing him and placing him in the back of his patrol vehicle. "Cuomo was transported to the Sheriff's Office for questioning and the vehicle was impounded." Schmidt later identified Cuomo's vehicle as the vehicle he saw in the subdivision. Cuomo's mother came to visit and the room was wired and Cuomo made some incriminating statements regarding the shooting.

Based on the facts the officers had at the time Cuomo was pulled over (listed above) and the "totality of the circumstances," the 1st DCA held that "the State clearly demonstrated that the officers had reasonable grounds to believe that the defendant shot the victim. Consequently, the officers had probable cause to arrest the defendant at the time he was taken into

custody." The 1st DCA reversed "the trial court's orders granting the defendant's motion to suppress the evidence obtained as a result of his arrest."

[*State v. Cuomo*, 08/31/10]

2nd DISTRICT COURT OF APPEAL

Double jeopardy bars vehicular homicide charge; defendant already convicted of lesser included offense of reckless driving with serious bodily injury for the same underlying act.

The facts revealed that undercover drug officers arranged to purchase cocaine from Rashane Barber at a predetermined location. Merriex drove Barber to that location. Following the completion of the drug transaction, the officers attempted to make an arrest and Merriex sped off in the vehicle at a high rate of speed. Merriex "ran a red light and crashed into another vehicle, killing Nachenga Robinson and injuring Carolyn Johnson, Eric Robinson, and Obadiah Robinson." In January 2009, Merriex pled guilty to "leaving the scene of a crash involving the death of Nachenga Robinson, third-degree felony murder of Nachenga Robinson, and three counts of reckless driving with bodily injury to Carolyn Johnson, Eric Robinson, and Obadiah Robinson." See §§ 316.027, 782.04, 316.192, Fla. Stat. (2008). Merriex was sentenced to twenty-four years in prison. "A few weeks later, Carolyn Johnson died from her injuries." Merriex was charged with vehicular homicide and third-degree felony murder in circuit court case number 09-19457. See §§ 782.071, 782.04. Merriex's motion to dismiss the vehicular homicide charge was granted by the trial court. The trial court relied on Chikitus v. Shands, 373 So. 2d 904 (Fla. 1979), concluding that "double jeopardy barred the vehicular homicide charge because Mr. Merriex had already been convicted of the lesser included offense of reckless driving with serious bodily injury for the same underlying act." Merriex pled guilty to the third-degree felony murder charge, was sentenced to 124.65 months in prison, and the State appealed "the dismissal of the vehicular homicide charge, arguing that Chikitus does not apply."

The 2nd DCA concluded that "[m]ootness dooms the State's argument. Mr. Merriex's conviction of third-degree felony murder bars a vehicular homicide conviction for the same death," and that "[o]nly one homicide conviction and sentence may be imposed for a single death." Houser v. State, 474 So. 2d 1193, 1196 (Fla. 1985); Rodriguez v. State, 875 So. 2d 642, 645-46 (Fla. 2d DCA 2004); Collins v. State, 605 So. 2d 568, 569 (Fla. 5th DCA 1992) ("one death/one conviction rule"). The 2nd DCA affirmed.

[*State v. Merriex*, 08/27/10]

3rd DISTRICT COURT OF APPEAL

Suppression motion granted in error; search was a permissible search incident to arrest.

Williams was initially pulled over because of his vehicle's "darkly tinted windows." As the officers approached his vehicle, they could smell marijuana. One officer also saw "a marijuana cigarette sitting by the gearshift." Williams was "removed from the vehicle," and arrested for "possession of cannabis." "While conducting a search incident to arrest," a loaded handgun was found under the driver's seat, which Williams admitted was his. Williams "moved to suppress evidence of the firearm and marijuana, arguing that the search of the vehicle was unconstitutional." The trial court granted the motion finding the "search was an illegal warrantless search," based on Arizona v. Gant, 129 S.Ct. 1710 (2009). The State appealed.

The 3rd DCA found "the search was permissible, and the evidence is admissible," and reversed and remanded the order granting the suppression motion. The 3rd DCA concluded that "the officers made a lawful stop and then arrested the defendant after first smelling and then seeing marijuana in his car. The officers could then legally search the vehicle, as it was reasonable to believe that evidence of marijuana might be found in the vehicle."

[*State v. Williams*, 08/25/10]

4th DISTRICT COURT OF APPEAL

Florida's implied consent statute does not require police officers to advise persons arrested for DUI that the right to counsel does not attach to their decision to submit to breath test, but only requires that person be told that failure to submit to test will result in suspension of driving privileges and that refusal to submit can be admitted at trial.

The 4th DCA consolidated two cases since they presented the same issued concerning the defendant's refusal to submit to a breath test, based on a mistaken belief that they had a right to counsel before deciding to submit to breath testing. The district court substituted this opinion for a previously issued opinion. 35 Fla. L. Weekly D666 (Fla. 4th DCA Mar. 24, 2010).

In this lengthy opinion the 4th DCA examined whether the "confusion doctrine is a recognized exclusionary rule or defense to a license suspension in Florida." While the district court opined that Florida's "implied consent statute does not obligate a police officer to advised an accused that the right counsel does not apply to the breath test setting," the court saw "no harm in placing a minimal burden on officers to briefly explain this to suspects who request counsel when asked to submit to a breath test."

The district court in citing a 1999 Wisconsin opinion stated:

> We believe that responsible police practice "should lead professional, courteous officers to advise insistent defendants that the right to counsel does not apply to chemical tests. Where a driver repeatedly asks to speak with an attorney, it would be courteous and simple for the officer to correct the accused's mistaken assumptions." *State v, Reitter*, 595 N.W.2d 646 at 655.

The 4th DCA opined that it could not impose duties beyond those created by the legislature since the purpose of the implied consent statute was to assist prosecuting drunk drivers' cases. Whether informing the driver that he or she has no right to counsel for breath testing purposes, frustrates or supports the goal of obtaining evidence is within the purview of the legislature.

[*Kurecka v. State*, 09/29/10]

KURECKA v. STATE.DOC

ATTORNEY GENERAL OPINION

Exemptions from public records law of former law enforcement officer's home address.

A former law enforcement officer who is employed by the Town of Malabar in a non-law enforcement capacity is required to make a written request that his personal information be maintained as exempt by the employing governmental agency.

The Attorney General further opined that only the current home address is exempted from public disclosure. Additionally, this exemption would apply to any vacation home, as well as the primary residence.

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Approved by:
Michael J. Alderman, Acting General Counsel

Edited By:
Judson M. Chapman, Senior Assistant General Counsel
Peter N. Stoumbelis, Senior Assistant General Counsel
Heather Rose Cramer, Assistant General Counsel
Jason Helfant, Assistant General Counsel
Kimberly Gibbs, Assistant General Counsel
Douglas D. Sunshine, Assistant General Counsel
Sandee Coulter, Assistant General Counsel
M. Lilja Dandelake, Assistant General Counsel
Jim Fisher, Senior Assistant General Counsel
Damaris Reynolds, Assistant General Counsel
Richard Coln, Senior Assistant General Counsel

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